Supreme Court, U.S.
FILED

051435 MAY 2 - 2006

OFFICE OF THE CLERK

No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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STATE OF TEXAS,
Petitioner,

v.

JETT J. MASON, JR.,
Respondent.

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On Petition For Writ of Certiorari to the
Court of Appeals of Texas, Fifth District

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a domestic violence victim's statement that she was assaulted and threatened with death, made to a police officer at the scene while the person who made the threat was still present, was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004).

2. Whether a police officer's asking a crying, upset, injured woman why she called the police, upon the officer's arrival at the scene in response to an emergency call, was interrogation under *Crawford v. Washington*, 541 U.S. 36 (2004).

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## PETITION FOR WRIT OF CERTIORARI

The Court of Appeals of Texas, Fifth District, erroneously held that the admission into evidence of a cry for help the non-testifying domestic violence victim made as an excited utterance to a police officer responding to an emergency call was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court of Appeals of Texas, Fifth District, also erroneously held that when the police officer arrived at the scene in response to an emergency call and asked the crying, upset, injured woman why she called the police, that was interrogation under *Crawford v. Washington*, 541 U.S. 36 (2004).

The lower court's decisions conflict with various state courts of last resort and United States Courts of Appeals. The Court should grant this petition to resolve the conflict and address these important and unsettled questions of federal constitutional law.

## OPINION BELOW

The Court of Appeals of Texas, Fifth District, reversed Mason's conviction on June 30, 2005. *Mason v. State*, 173 S.W.3d 105 (Tex. App. — Dallas 2005); PA[1] 1-12. The Texas Court of Criminal Appeals refused the State's petition for discretionary review on February 1, 2006. PA 13.

## JURISDICTION

The Court of Criminal Appeals refused the State's petition for discretionary review on February 1, 2006. PA 14. Thus, the State's petition for writ of certiorari is timely filed on or before May 2, 2006. SUP. CT. R. 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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[1] "PA" refers to the appendix to the instant petition for certiorari review, and is followed by page references.

## CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

## STATEMENT OF THE CASE

### I. Proceedings in the Trial Court

The court below succinctly summarized the facts of this case:

> A jury convicted Jett J. Mason, Jr. of misdemeanor assault and assessed his punishment at confinement in the Dallas County jail for one day. See Tex. Pen. Code Ann. § 22.01(a)(1), (b) (Vernon Supp. 2004-05). Following the jury's recommendation, the trial court suspended imposition of the sentence and placed appellant on community supervision for six months.
>
> * * *
>
> Donald Blasingame, a patrol sergeant with the Seagoville Police Department, and the State's only witness at trial, testified that on July 6, 2002, he responded to a 911 disturbance call at a Seagoville residence. When Blasingame arrived, [Sarah Henderson], who was upset, crying, and angry, answered the door. In response to Blasingame's question about why she called the police, [Henderson] said that she and her boyfriend, later identified as appellant [Jett Mason], had been sleeping when his cellular telephone rang. When [Henderson] woke [Mason] up to answer the telephone, he slapped her on the face, shoved her off the bed, put his hand on her throat, and told her he was going to kill her. Blasingame observed red marks and swelling around [Henderson's] mouth and nose, which were consistent with her statements.

> Blasingame also spoke to [Mason]. [Mason] told Blasingame that he accidentally hit [Henderson] when he reached over to get the telephone. Disbelieving [Mason's] version, Blasingame arrested [Mason] based on [Henderson's] oral statements and his observations at the scene.
>
> [Henderson] did not appear at trial. [footnote 3-The record reflects [Mason] and [Henderson] were still together at the time of trial]. The State sought to prove its case through Blasingame's hearsay testimony of [Henderson's] oral statements made to him at the scene. [Mason] objected to the out-of-court statements on both hearsay and Confrontation Clause grounds. Following a pretrial hearing outside the jury's presence, the trial court ruled [Henderson's] out-of-court oral statements to Blasingame were admissible.

PA 1-2. The substance of the 911 call was not introduced into evidence. In response to the 911 call, the officer was dispatched at 7:24 p.m. 2 RR[2] 14. Mason was arrested at 7:37 p.m. after the officer spoke with Henderson and Mason 2 RR 12, 14. The trial court determined that Henderson's statements qualified as excited utterances under TEX. R. EVID. 803(2). PA 4.

**II. Proceedings in the Court Below**

The lower court reversed the trial court's judgment on June 30, 2005. PA 13. The state court of appeals recognized that courts have split on the question. PA 7. The state court disagreed with the State's argument that an excited utterance is not made under circumstances conducive to contemplation of future legal proceedings. PA 8. The court read into the State's argument that

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[2] "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by the volume number and followed by page number(s).

the contemplation be subjective. PA 8. That court observed that the test under *Crawford v. Washington*, 541 U.S. 36 (2004), is objective, rather than subjective. PA 8. Turning to interrogation, the court declined to equate "interrogation" in the Sixth Amendment context with "interrogation" in the Fifth Amendment context, although the State had not asked that the court do so. PA 9. Instead, the State argued that Blasingame's inquiry into why he had been summoned was not "interrogation," as that term is understood colloquially. State's appellate brief at 10. The state court of appeals then concluded that Henderson's statements resulted from an interrogation within the meaning of the Sixth Amendment, so they were testimonial. PA 10. Although the court purported to so conclude "[f]or the reasons set out above," there were no actual reasons previously set out in its opinion that explained its decision. The court further determined that even if the statements were not the product of interrogation, they were testimonial because they were made under circumstances which would lead an objective witness reasonably to believe that those statements would be available for use at a later trial. PA 10.

The Texas Court of Criminal Appeals refused the State's petition for discretionary review on February 1, 2006. PA 13. The instant petition follows.

## REASONS FOR GRANTING THE WRIT

This Court has granted petitions for writ of certiorari on very similar issues in *Hammon v. Indiana*, No. 05-5705, and *Davis v. Washington*, No. 05-5224, concerning whether statements to a 911 operator and statements to police responding to an emergency dispatch are testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). This Court's decision in *Hammon* and *Davis* will affect the present case.

The state court decided an important federal question that has not been, but should be, settled by this Court. Although this Court is considering similar questions in *Hammon* and *Davis*, this case presents facts significantly distinguishable from *Hammon* and *Davis* on this important federal question that warrant this Court's attention. In this case the officer only asked Henderson why she called the police, which was an innocuous preliminary question by the officer acting in his public safety, community caretaking role. Henderson's statements, that Mason had hit her and had threatened to kill her, were excited utterances. Mason was still at the scene.

The issue involved is one of great and continuing importance. The prevalence of domestic violence is astonishing. A vast number of domestic violence cases either have to be dismissed or have to be tried based on victim statements of the type used in the present case, because of the lack of cooperation of the victim and the lack of the victim's presence at trial. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 749-50 & n.50, 769, 772-73; Donna D. Bloom, Comment, *"Utter Excitement" about Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington*, 36 ST. MARY'S L.J. 717, 731. This Court's guidance in this area is necessary after *Crawford v. Washington*.

The state court's decision on this important question of federal law conflicts with decisions of other state courts of last resort and with decisions of United States Courts of Appeals. *See* cases listed *infra* at 14, 20-22. The state court's utilization of the objective test failed to account for the nature of the statement as a cry for help through an invocation of the police's community caretaking or public safety function, the significance of the excited utterance, and the dynamics of domestic violence.

The statement in this case was non-testimonial because it was a cry for help, in the form an excited utterance, and an invocation

of the police's community caretaking or public safety function. Mason had threatened to kill Henderson, and Mason was still at the scene. The statement in the present case was non-testimonial because it was not the product of interrogation. On arrival at the scene, the responding officer just asked the crying, upset, and obviously injured victim why she called the police. That was not interrogation in the colloquial sense.

## I. This Court Has Granted Petitions for Writ of Certiorari on Very Similar Issues in *Hammon v. Indiana*, No. 05-5705, and *Davis v. Washington*, No. 05-5224.

On March 20, 2006, this Court heard oral arguments in *Hammon v. Indiana*, and *Davis v. Washington*. Those cases present this Court with the issue of whether a victim's oral statement to a police officer, or to a 911 operator, were testimonial statements within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

### A. *Crawford*

In *Crawford*, this Court held that the admission of testimonial hearsay violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Id.* at 68. Although the Court found it unnecessary to set out a comprehensive definition of testimonial, *id.* at 68, the Court noted the existence of at least three formulations of the core class of "testimonial" statements: (1) "*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial."[3] *Id.* at 51-52. This Court further stated, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52. This Court noted that it used the term "interrogation" in a colloquial sense. *Id.* at 53 n.4.

**B. *Hammon***

In *Hammon*, two police officers responded to a domestic disturbance dispatch at the Hammons' residence. HRB[4] at 1; HPB[5] at 1. At the residence, the police officers found a frightened Ms. Hammon on the front porch. HRB at 1; HPB at 1. One of the officers asked Ms. Hammon if there was a "problem" or if "anything was going on," to which Ms. Hammon responded, "No, nothing was the matter . . . that everything was okay." HRB at 2; HPB at 1. At this point, the officers did not want to leave, so they asked permission to enter the home, and, once inside, one officer went into the kitchen and started questioning Mr. Hammon, and the other officer stayed in the living room, and questioned Ms. Hammon. HRB at 2–4; HPB at 1–2. The officer did not see any injuries on Ms. Hammon. HRB at 4; HPB at 2 n1. Thereafter, Mr. Hammon was arrested, and the officer had Ms. Hammon complete

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[3] This Court found it unnecessary to decide the particular parameters of what is "testimonial," because the statement in *Crawford* was testimonial under any standard. Similarly, this case does not require this Court to make that decision, and the State does not argue for a particular definition, because the statements in this case are not testimonial under any of the three formulations of "testimonial" suggested in *Crawford*.

[4] "HRB" refers to the brief filed in this Court by the Respondent in *Hammon v. Indiana*, No. 05-5705.

[5] "HPB" refers to the brief filed in this Court by the Petitioner in *Hammon v. Indiana*.

and sign a battery affidavit recounting the events of the evening. HRB at 4; HPB at 2–3.

At trial, Ms. Hammon did not testify, but the oral statements that Ms. Hammon made to the officer in response to his questioning were admitted under the excited utterance exception to the hearsay rule. HPB at 3; HRB at 4–5.

### C. *Davis*

Similarly, in *Davis*, Ms. McCottry called 911, but before reporting a problem, Ms. McCottry hung up the telephone. DPB[6] at 5; DRB[7] at 1. The 911 operator recalled the telephone number, and Ms. McCottry answered, but was shouting to another person in her apartment. DPB at 1. After locking the door to her apartment, Ms. McCottry resumed the conversation with the 911 operator. DPB at 5; DRB at 1. Ms. McCottry reported that her exboyfriend had violated a protective order and had beaten her. DPB at 5; DRB at 1. Thereafter, the 911 operator asked Ms. McCottry a series of questions in an interview that lasted for about four minutes. DPB at 5. During this interview, the 911 operator learned what had transpired, whom was involved, and even the birth date of the suspect. DPB at 5. At trial, Ms. McCotty did not testify, but the statements that she made to the 911 operator were admitted under the excited utterance exception to the hearsay rule. DPB at 7; DRB at 3.

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[6] "DPB"refers to the brief filed in this Court by the Petitioner in *Davis v. Washington*, No. 05-5224

[7] "DRB" refers to the brief filed in this Court by the Respondent in *Davis v. Washington.*

## D. The Effect of *Hammon* and *Davis* on the Present Case

### 1. If the Statements in *Hammon* or *Davis* Are Not Testimonial, this Court Should Grant this Petition, Vacate the State Appellate Court's Judgment, and Remand the Case to That Court.

This Court's decision in *Hammon* and *Davis* will impact this case. If this Court holds that the statements in *Hammon* or *Davis* were not testimonial such that their admission did not violate the Sixth Amendment, that decision would likely compel the state court in this case to similarly find no Sixth Amendment violation.

In this case, the trial court held a pretrial hearing to determine whether Henderson's statements to Blasingame were admissible. 2 RR 10-27. Counsel for both sides argued whether the statements were admissible in light of *Crawford*. 2 RR 16-21. The trial court ruled that the statements could be introduced into evidence. 2 RR 27. Blasingame testified about the statements at trial. 2 RR 36

On July 6, 2002, Blasingame was dispatched following a 911 call.[8] PA 2; 2 RR 10, 34–35. Blasingame was dispatched at 7:24 p.m., and he arrested Mason at 7:37 p.m. after talking with both Henderson and then Mason 2 RR 12, 14. Therefore, Blasingame arrived very soon after the 911 call. Upon arrival, an "extremely upset," "crying," and "mad" Henderson answered the door. PA 2; 2 RR 10, 35–36, 41–42. Henderson had some redness and swelling beginning around her mouth and nose. PA 2; 2 RR 10, 36. Blasingame asked Henderson one question, "Why did you call the police?" PA 2; 2 RR 13, 22, 23, 24, 26, 27, 50. Blasingame testified that he was not interrogating her, he was merely trying to find out why he was there. 2 RR 22–23. In response to this one question, a very upset and crying Henderson told Blasingame that,

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[8] The substance of the 911 call was not introduced into evidence.

while she was in bed with Mason, Mason's cell phone rang. PA 2; 2 RR 11–12, 36. She told Mason that his cell phone was ringing, and Mason then slapped her in her face. PA 2; 2 RR 11, 36. Mason shoved her off of the bed and slapped her some more. PA 2; 2 RR 11, 36. He then put his hand on her throat. PA 2; 2 RR 11, 36. Mason told Henderson that he was going to kill her. 2 RR 11, 36.

Here, the level of police questioning did not come close to that in *Hammon* or *Davis*, so it had even less potential to be an interrogation than the questioning in *Hammon* or *Davis*. Henderson's statement was made in response to the first, initial question by Blasingame: "Why did you call the police?" 2 RR 13, 22, 23, 24, 26, 27, 50. As testified to by Blasingame, this type of initial question was routine practice, and was made in an attempt to ascertain why the police were called. 2 RR 13, 22. The statements made in *Hammon* and *Davis* were made only after a series of questions by officials. The initial communication with Ms. Hammon was made when one of the officers asked if there was a "problem" or if "anything was going on," to which Ms. Hammon responded "No, nothing was the matter . . . that everything was okay." HRB at 2; HPB at 1. The officers asked if they could come into the house. HRB at 2–4; HPB at 1–2. The officers entered the home, separated the husband and wife, and one officer asked Ms. Hammon questions regarding the night's events until the statement at issue was uttered. HRB at 2–4; HPB at 1–2. Likewise, and unlike the case-at-bar, the statement at issue in *Davis* was made in response to a four-minute series of questions by the 911 operator. DPB at 3–5.

Therefore, because Blasingame asked only one, initial question to help ascertain the nature of the disturbance, and because he did not participate in the type and extent of questioning seen in *Hammon* and *Davis*, if the questioning in *Hammon* or *Davis* is not be found to have been interrogation, then Blasingame's question cannot be considered interrogation.

Finally, the statements by Henderson were more clearly a cry for help from Blasingame in his public safety, community caretaking role, than the statements in *Hammon* and *Davis*. That is buttressed by the excited utterance nature of the statements. Henderson briefly relayed what Mason had done, including his threat to kill her. Henderson was still present at the scene when Blasingame arrived. Henderson called the police for help and protection. Mason told Henderson that he would kill her, and, at the time the police were summoned, Henderson was acting under that looming threat because Mason was still there at their residence. 2 RR 11–12, 14, 36–37. Therefore, unlike the *Hammon* and *Davis* cases, Henderson was faced with the looming threat of death imposed upon her by Mason, a man who was not fleeing the scene. The officer was dispatched at 7:24 p.m. in response to the 911 call, and Mason was arrested at 7:37 p.m.[9] 2 RR 14. Therefore, Henderson's statement to Blasingame was made shortly after the 911 call.

Thus, if this Court determines that the statements in either *Hammon* or *Davis* were not testimonial, this Court should grant this petition for writ of certiorari, vacate the state court's judgment, and remand the case to that court for reconsideration in light of *Hammon* and *Davis*.

### 2. If the Statements in *Hammon* and *Davis* Are Testimonial, this Court Should Grant this Petition, Address the Significant Distinctions in this Case, and Determine That the Statements in the Present Case Were Not Testimonial.

If this Court concludes that the statements in both *Hammon* and *Davis* are testimonial, this Court should grant this petition, address the statements and surrounding circumstances in this case, and

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[9] Blasingame spoke with Mason after speaking with Henderson. 2 RR 12, 14. Mason had not been arrested yet when Blasingame and Mason spoke. 2 RR 12.

determine that Henderson's statements were not testimonial.

Unless this Court makes the broad holding in *Hammon* and *Davis* that any statement to a police officer or a 911 operator about another's criminal activity is testimonial, regardless of the circumstances, a determination that the statements in *Hammon* and *Davis* were testimonial does not dictate such a holding in this case.

For the same reasons set forth in the immediately preceding section of this petition, there are significant distinctions between the statements and surrounding circumstances in this case and those in *Hammon* and *Davis*. Even if this Court concludes that the statements in *Hammon* and *Davis* were testimonial, this petition should be granted, and, at the least, the judgment of the state appellate court should be vacated and the case remanded to that court for reconsideration in light of the guidance that will be provided by this Court in *Hammon* and *Davis*.

However, the State urges that if this Court concludes the statements in *Hammon* and *Davis* were testimonial, this Court should grant this petition and consider this case on its merits. In light of the great importance and the prevalent occurrence of the federal question presented here, as explained in Part IV, *infra*, this Court should seize this opportunity to provide further guidance to the courts and litigants in the United States on the use of cries for help in the form of excited utterances in domestic violence cases.

## II. Although the State Court Purported to Use an Objective Test to Determine Whether the Statements Was Testimonial, the Court Ignored the Circumstances Surrounding the Statements.

In discussing the third formulation of "testimonial" suggested in *Crawford*, the state appellate court held that an objective, rather than a subjective, test is appropriate for determining whether statements that were made under circumstances which would lead

an objective witness reasonably to believe that the statement would be available for use at a later trial. PA 8. The State has no quarrel with that holding, because that formulation of "testimonial" refers to an "objective witness." *Crawford v. Washington*, 541 U.S. at 52. However, that does not mean that the court should ignore the circumstance surrounding the making of the statement. That particular formulation also inquires about the circumstances under which the statement was made. *Id.* The state court did not examine those circumstances and discounted the State's argument that the court should engage in such an examination. Such an examination is necessary to determine whether the statements were testimonial.

**III. Henderson's Statements Were Not Testimonial.**

**A. Henderson's Statements Were Not the Product of Interrogation.**

Police officers perform the investigative functions that justices of the peace exercised in conducting examinations under the Marian statutes, which led to the abuses about which the Confrontation Clause was primarily concerned. *Crawford v. Washington*, 541 U.S. at 53. Therefore, statements taken by police officers in the course of interrogations are testimonial. *Id.* at 52, 53.

This Court used the term "interrogation" in its colloquial sense, rather than a technical legal sense, but found it unnecessary to select a particular definition of "interrogation" in *Crawford*. *Id.* at 53 n.4.

When determining what is meant by "interrogation," an examination of common definitions, as found in dictionaries, is necessary, set against the backdrop of the historical practices and abuses the Confrontation Clause was designed to protect against.

> The dictionary definition of "interrogation" is "question[ing] typically with formality, command, and thoroughness for full information and circumstantial detail." . . . Webster's Third New Int'l Dictionary 1182 (1993). *See*

American Heritage Dictionary 685 (4th ed.2000) (defining "interrogate" as "[t]o examine by questioning formally or officially"); Merriam-Webster's Dictionary of Law (1996) ("to question formally and systematically"). That is the "colloquial" understanding of what "interrogation" entails, *Crawford, supra* at 53 n. 4, 124 S.Ct. 1354, and that is the definition we should be applying to comply with *Crawford.*

The proposition that "police interrogation" involves structured, thorough, and detailed questioning has considerable support in cases to date. *See, e.g., Mungo v. Duncan*, 393 F.3d 327, 336 n. 9 (2d Cir.2004), *cert. denied sub nom. Mungo v. Greene*, --- U.S. ----, 125 S.Ct. 1936, 161 L.Ed.2d 778 (2005) (rejecting proposition that "interrogation" encompasses "any asking of questions," in favor of dictionary definition "to question typically with formality, command, and thoroughness for full information and circumstantial detail," as that definition was "more consistent" with types of testimonial statements mentioned in *Crawford*); *Anderson v. State*, [111 P.3d 350, 353 (Alaska Ct. App. 2005)] ("interrogation" refers to "category of formal, official, and systematic questioning"); *People v. Corella*, 122 Cal.App.4th 461, 468, 18 Cal.Rptr.3d 770 (2004) ("police interrogation" under Crawford "requires a relatively formal investigation where a trial is contemplated"); *United States vs. Webb*, D.C. Sup.Ct. No. DV-339-0400 (Nov. 9, 2004); *State v. Hembertt*, 269 Neb. 840, 850, 696 N.W.2d 473 (2005) ("structured police questioning"). *See also Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005) ("police interrogation" for purposes of confrontation clause "is properly limited to attempts by police to pin down and preserve statements").

*Commonwealth v. Gonsalves*, 833 N.E.2d 549, 564-65 (Mass. 2005) (Sosman, J., concurring).

> The [Supreme] Court's reasons for applying the confrontation clause to statements procured by "police interrogation" also included a more general concern about the evil the confrontation clause was intended to address. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford*, *supra* at 56 n.7, 124 S.Ct. 1354. However, when the police arrive at the scene and ask basic, preliminary questions (*e.g.*, "What's going on?"), they do not know whether they will be told about a crime, an accident, a misunderstanding or a false alarm; nor do they know whether anyone will report that there is some injury or imminent danger that needs their attention. When the police are trying to ascertain such basic information, they do not yet have "an eye toward trial," *id.*– they are trying to find out, among other things, whether there is even any crime to be investigated, and they are simultaneously trying to ascertain whether there is any ongoing threat or need for medical attention. Such preliminary questions on arrival at the scene ("What's happening?" "What did he do?" "Where is he now?") are not intended to produce "testimony" but to assess the situation and inform the officers' decision as to what immediate steps they must take. I see no "unique potential for prosecutorial abuse," *id.*, in such preliminary inquiries.
>
> Once the police are in fact investigating an alleged crime and preparing a case for potential prosecution, police questioning that takes on some aura of formality, solemnity, or (at a minimum) thoroughness, is what makes it

"interrogation" for purposes of the confrontation clause.

*Id.* at 564.

"Interrogation" conveys something more than the simple asking of a question. It connotes a particular subset of questioning — that which officially inquires with some degree of focus or concentrated purpose in a formal, solemn, systematic, or thorough manner, seeking details about a specific subject matter — in these types of cases, a crime — that is being investigated.

Here, when Blasingame arrived in response to a dispatch, facing an extremely upset, crying person, and without knowing what situation lay ahead, he asked Henderson why she called the police. In that context, the question was not interrogation in its colloquial sense, nor does it call to mind justices of the peace seeking to secure solemn testimony to be used in a criminal trial, whether for a great crime of treason against the crown or otherwise.

The question was not even investigative. At that point, Blasingame had no idea whether a crime actually had been committed, whether a medical emergency existed, or whether there was just an argument occurring at the residence. When Blasingame asked the question, he was wearing all hats — that of the enforcer of laws, that of the apprehender of criminals, that of the provider of public safety and caretaker of the community, and even that of an authority figure who can serve as an on-the-spot arbitrator, mediator, counselor, or adviser if necessary. *See Laney v. State*, 117 S.W.3d 854, 860 (Tex. Crim. App. 2003) (a police officer has duties in addition to apprehending criminals, such as the duty to aid people in danger of physical harm, the duty to assist persons who cannot care for themselves, and the duty to resolve conflict), citing WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE 6.6 (1996), which in turn quoted the ABA STANDARDS FOR CRIMINAL JUSTICE § 1-1.1 (2d ed. 1980).

Moreover, Henderson contacted the police, and not vice versa. That would not itself make the statements non-testimonial, because a statement can be testimonial without the interrogatory probing and prodding by police. However, that would preclude the statements from being the product of interrogation, since Henderson naturally would have wanted to say what she said to the police, inasmuch as she called them to the scene.

Consequently, Henderson's statements were not the product of interrogation such as would render them testimonial.

### B. Henderson's Statements Were a Cry for Help, Invoking the Public Safety and Community Caretaking Function of the Police and Were Not Made under Circumstances Which Would Lead an Objective Witness Reasonably to Believe That the Statements Would Be Available for Use at a Later Trial.

The statements were not testimony under the first two proffered formulations of the core class of "testimonial" statements. They were not *ex parte* in-court testimony or its functional equivalent, and they were not extra judicial statements contained in formalized testimonial materials. *See Crawford v. Washington*, 541 U.S. at 51-52. The question is whether the statements fell within the purview of the third formulation proffered in *Crawford*.

#### 1. The Nature of Domestic Violence and Why Domestic Violence Victims Call the Police

One scholar concludes it is "inconceivable" and "untenable" that a domestic violence victim would inform the police about a crime against her without being partially motivated by the desire to assist in the prosecution of the batterer and without a motivation to assist in making the batterer atone for his crime. Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay is Analyzed Under the Confrontation Clause*, 36

SETON HALL L. REV. 327, 402. That is incorrect. It is neither inconceivable nor untenable. In fact, it is the norm.

Domestic violence victims commonly call the police for reasons other than to serve as the impetus for the batterers' incarceration and prosecution. That is because domestic violence crimes are significantly different from other crimes.[10]

"[T]here are two central features of domestic abuse. The first is that the abuse occurs within the context of an intimate relationship. The second is that the abuse is systematic." Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom Based Account*, 65 LA. L. REV. 989, 995.

"[D]omestic violence relationships typically follow a three phase cycle: tension-building, acute battering, and loving contrition." Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 236. Once completed, the cycle repeats itself. *Id.* at 237.

> The unique characteristics of domestic violence make the battered woman an "atypical" victim. . . . [B]attered women have strong ties to their abusers and are likely to be more ambivalent about official intervention than is true of other victims of crime. The goal of domestic violence victims is often different than that of other crime victims; the battered woman's primary goal is simply to stop the violence. She is more interested in resolution than in restitution or retribution.

Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 319 (internal

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[10] The differences explain the lack of cooperation by domestic violence victims.

quotation marks omitted).

Because of the unique nature of domestic violence, victims frequently call the police for reasons other than an arrest and prosecution. "Battered women call the police for a variety of reasons — not necessarily to have their partners arrested and prosecuted. For example, a woman might call the police to send a message to the batterer that his violence is not acceptable." *Id.* at 316. "She might reason that police officer could [defuse] an explosive situation or frighten her batterer into ceasing his abuse." Barbara Fedders, Note, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 292. When a battered woman calls the police, she may want only medical assistance or the removal of the batterer from the home. Elaine Chiu, *Confronting The Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1230.

Domestic violence victims frequently do not want their abusers arrested or prosecuted. Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 660. In a study of Omaha domestic violence cases, 60% of the victims indicated they had not wanted an arrest made. Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 940. Similarly, a study in Charlotte showed that only 42% of victims of misdemeanor domestic violence insisted on an immediate arrest. *Id.* at 950.

Another law review article states, "[O]nly 11-24% of victims of intimate violence reported the incident to punish the offender." Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 n. 49.

The uniqueness of domestic violence cases can perhaps be best summed up by the following incident. A domestic violence victim asked that charges against the defendant be dismissed because the victim needed the bond money back. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers*, 7 WM. & MARY J. WOMEN & L. 383, 393.

### 2. The Cry for Help

Domestic violence victims call the police because they "need protection. The call is an act of survival — there is rarely an opportunity to think twice." Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1897.

> [A] number of state courts have considered whether statements made to the police during 911 calls or immediately upon their arrival at the scene of an ongoing or recent crime or emergency were testimonial, with most concluding that they were not. *See, e.g., Anderson v. State*, 111 P.3d 350, 353-56 (Alaska Ct.App.2005); *People v. Corella*, 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770, 776 (2004);*Pitts v. State*, 272 Ga.App. 182, 612 S.E.2d 1, 5 (2005); *People v. West*, 355 Ill.App.3d 28, 291 Ill.Dec. 72, 823 N.E.2d 82, 88-92 (2005); *Hammon v. State*, 829 N.E.2d 444, 456-58 (Ind.2005); *State v. Barnes*, 854 A.2d 208, 211-12 (Me.2004); *People v. Walker*, 265 Mich.App. 530, 697 N.W.2d 159, 163- 66 (2005), *lv. app. granted*, 472 Mich. 928, 697 N.W.2d 527 (2005); *State v. Wright*, 701 N.W.2d 802, 811-14 (Minn.2005); *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473, 482-84 (2005); *People v. Mackey*, 5 Misc.3d 709, 785 N.Y.S.2d 870, 872-74 (2004); *People v. Moscat*, 3 Misc.3d 739, 777 N.Y.S.2d 875, 879-80 (2004); *State v. Forrest*, 164 N.C.App. 272, 596

S.E.2d 22, 26-27 (2004), *aff'd*, 359 N.C. 424, 611 S.E.2d 833 (2005); *State v. Davis*, 154 Wash.2d 291, 111 P.3d 844, 849-51 (2005). *But see, e.g., Lopez v. State*, 888 So.2d 693, 698-700 (Fla.Dist.Ct.App.2004); *People v. Cortes*, 4 Misc.3d 575, 781 N.Y.S.2d 401, 404-07, 415-16 (N.Y.Sup.Ct.2004); *State v. Powers*, 124 Wash.App. 92, 99 P.3d 1262, 1264-66 (2004).

As a general matter, the cases holding that such statements were not testimonial have cited the same factors I have relied upon here, including (i) an ongoing or very recently abated threat faced by the declarant, *see, e.g., Pitts*, 612 S.E.2d at 4; *West*, 291 Ill.Dec. 72, 823 N.E.2d at 88-91; *Wright*, 701 N.W.2d at 811, 813; *Hembertt*, 696 N.W.2d at 483-84; *Moscat*, 777 N.Y.S.2d at 879-80; *Forrest*, 596 S.E.2d at 27; *Davis*, 111 P.3d at 850-51; (ii) the declarant's initiation of contact with the police, and not vice versa, *see, e.g., Corella*, 18 Cal.Rptr.3d at 776; *Pitts*, 612 S.E.2d at 4; *Barnes*, 854 A.2d at 211; *Moscat*, 777 N.Y.S.2d at 879; *Forrest*, 596 S.E.2d at 27; (iii) the volunteering of information to the police, as opposed to a statement elicited through interrogation or structured questioning, *see, e.g., Forrest*, 596 S.E.2d at 27; and (iv) the nature of the information provided, reflecting a need for immediate aid rather than an intent to precipitate or assist in a criminal investigation or prosecution, *see, e.g., West*, 291 Ill.Dec. 72, 823 N.E.2d at 89, 91; *Hammon*, 829 N.E.2d at 458; *Barnes*, 854 A.2d at 211; *Wright*, 701 N.W.2d at 813-14. The decisions reaching a different result, in contrast, typically feature distinguishable facts and circumstances, such as directed questioning by a 911 operator, *see Cortes*, 781 N.Y.S.2d at 404-07, or a statement which conveys information outside the scope of the declarant's need for immediate aid, *see Powers*, 99 P.3d at 1266.

*United States v. Hadley*, 431 F.3d 484, 505-06 (6th Cir. 2005) (Rosen J., opinion).

Federal courts of appeals have reached the same conclusion as the majority of state courts. *See, e.g., United States v. Brito*, 427 F.3d 53, 59-63 (1st Cir. 2005); *United States v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004).

Police officers do more than investigate crimes. They have a public safety, community caretaking function, also. "Local police officers . . . engage in . . . community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *see also South Dakota v. Opperman*, 428 U.S. 364, 368 (1976); *United States v. Hadley*, 431 F.3d at 502 (Rosen, J., opinion); *United States v. Brooks*, 367 F.3d 1128, 1135, 1137 (9th Cir. 2004); *Laney v. State*, 117 S.W.3d 854, 860 (Tex. Crim. App. 2003) (a police officer has duties in addition to apprehending criminals, such as the duty to aid people in danger of physical harm, the duty to assist persons who cannot care for themselves, and the duty to resolve conflict), citing WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE 6.6 (1996), which in turn quoted the ABA STANDARDS FOR CRIMINAL JUSTICE § 1-1.1 (2d ed. 1980).

### 3. The Excited Utterance

Courts diverge on whether excited utterances[11] are testimonial.

Some courts take the view that excited utterances never can constitute testimonial hearsay. Their rationale is that, by

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[11] In Texas, as in the federal system, excited utterances are not excluded by the rule against hearsay. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2); *see also* FED. R. EVID. 803(2).

definition, an excited utterance is made under the influence of a startling event and, thus, the declarant acts in response to that event rather than in response to interrogation or in anticipation of bearing witness. *See, e.g., United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (holding that excited utterances are not testimonial in nature because they are "emotional and spontaneous rather than deliberate and calculated"); *People v. Moscat*, 3 Misc.3d 739, 777 N.Y.S.2d 875, 880 (2004) (holding that an excited utterance is a cry for help and, therefore, not functionally equivalent to "a formal pretrial examination"). In each of these cases, the court upheld the admission of an "excited" 911 call in a criminal trial notwithstanding the declarant's unavailability. *See Brun*, 416 F.3d at 707; *Moscat*, 777 N.Y.S.2d at 880.

A second cluster of cases holds that the excited nature of the utterance has no bearing on whether a particular statement is testimonial. These courts effectively discount the excited nature of the utterance and focus instead on the declarant's objectively reasonable expectations. *See, e.g.*, [*U.S. v.*] *Arnold*, 410 F.3d [895,] 903 [(6th Cir. 2005)] (holding that, notwithstanding the excited nature of a 911 call, the declarant reasonably could expect that statements describing the crime and the perpetrator would be used prosecutorially); *Cortes*, 781 N.Y.S.2d at 415 (holding that all "[c]alls to 911 to report a crime are testimonial," even if they also qualify as excited utterances, because "the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding"). In each of these cases, the court ruled inadmissible in a criminal trial an "excited" 911 call due to the declarant's unavailability. *See Arnold*, 410 F.3d at 904; *Cortes*, 781 N.Y.S.2d at 416.

A third cadre of courts recognizes that the excited utterance

> inquiry and the testimonial hearsay inquiry are distinct but symbiotic; the startling event that gives rise to an excited utterance informs the Confrontation Clause analysis and often dissipates the very qualities of a statement that otherwise might render the statement testimonial. *See, e.g.*, *Arnold*, 410 F.3d at 914 (Sutton, J., dissenting) (reasoning that a frightened 911 caller rarely will have the state of mind needed to make a "solemn declaration" or a statement that he or she "would reasonably expect to be used prosecutorially"); *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005) (finding 911 call nontestimonial when declarant was "trembling, stuttering, crying [and] hyperventilating during the call") (internal quotation marks omitted) (alteration in original); *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473, 483 (2005) (holding excited utterances made to officers during an ongoing threat to be nontestimonial because those utterances were "not made in anticipation of eventual prosecution" but "to assist in securing the scene and apprehending the suspect"); *Drayton v. United States*, 877 A.2d 145, 149-50 (D.C.2005) (similar). This approach suggests that courts must undertake a case-by-case examination of the totality of the circumstances in order to determine whether or not a particular excited utterance should be deemed testimonial in nature.

*United States v. Brito*, 427 F.3d 53, 60-61 (1st Cir. 2005).

The First Circuit chose a case-by-case approach. *Id.* at 61. If a statement is an excited utterance, the court looks to the circumstances to assess the likelihood that a reasonable person would have retained or regained the capacity to make a testimonial statement at the time of the utterance. *Id.* at 62.

Along the way, the First Circuit briefly discussed the cry for

help scenario.

> Ordinarily, statements made to police while the declarant or others are still in personal danger cannot be said to have been made with consideration of their legal ramifications. Such a declarant usually speaks out of urgency and a desire to obtain a prompt response. It follows, therefore, that such statements will not normally be deemed testimonial.

*Id.*

This case does not compel a choice among the approaches, because the non-testimonial nature of Henderson's statements is not dependent on their being excited utterances.

**4. Henderson's Statements Were Not Testimonial**

When Henderson opened the door to Blasingame, Blasingame saw a crying, upset, angry, injured woman. He asked her why she had called the police. Henderson opened up and told him what Mason had done and said to her. As with most domestic violence victims, Henderson's statements reflected a need for immediate aid. Henderson's cry for help was particularly compelling because Mason had threatened to kill her. Because Mason was still present, so was the threat.

Henderson's statements were non-testimonial because they were a domestic violence victim's cry for help in the face of a looming threat. The parts of Henderson's statements that did not directly inform Blasingame about the threat specifically, were nevertheless communications placing the threat in context. They were an integral part of the cry for help and, therefore, not testimonial. The admission of Henderson's statements into evidence did not violate

the Confrontation Clause.[12]

The state appellate court erred by looking only at the words that Henderson spoke, without accounting for the circumstances under which they were spoken.

## IV. The Issue in this Case Compels Further Guidance from this Court, Because of the Prevalence of Domestic Violence and the Vast Number of Domestic Violence Cases That Either Have to Be Dismissed or That Have to Be Tried Based on Victim Statements of the Type Used in the Present Case.

### A. Prevalence of Domestic Violence

The prevalence of domestic violence is astonishing.

> A woman is abused every fifteen seconds. Every year, over two million women report being abused. . . . One out of four pregnant women has a history of domestic abuse. Domestic abuse is the leading cause of injury to women aged fifteen to forty-four. . . . Twenty-two to thirty-five percent of women who visit medical emergency facilities are there for injuries related to domestic abuse.

Kirsch, 7 WM. & MARY J. WOMEN & L. at 385-86. The Federal Bureau of Investigation reported over twenty years ago that in the United States a man beats a woman every eighteen seconds. Mordini, Note, 52 DRAKE L. REV. at 296.

Estimates of domestic violence incidents range from 572,000 to four million per year in the United States, with the disparity

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[12] No further analysis is necessary. If the Confrontation Clause does not bar non-testimonial hearsay, then there was no Sixth Amendment violation in admitting the statements into evidence. If *Ohio v. Roberts*, 448 U.S. 56 (1980), continues as the Confrontation Clause guardian against non-testimonial hearsay, then there was no Sixth Amendment violation, because the statements were excited utterances. *See White v. Illinois*, 502 U.S. 346 (1992).

attributed to the type of behavior targeted, ranging from assaults with little or no physical injury to assaults with serious injury or hospitalization. *Id.* "The most conservative estimates report that women are physically abused in 12% of all marriages. Other studies have estimated that as many as 50% or more of all women will be victimized at some point in their lives." *Id.* The 2000 National Violence Against Women Survey showed that 25% of women are subjected to violence by an intimate partner during their lifetime. Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOKLYN L. REV. 311, 326. "[A] large amount of intimate partner victimizations are not reported to the police. Some claim that as much [as] 50% of domestic violence goes unreported." *Id.*

> Those numbers are reflected in Texas, as well.
>
> The Texas Council on Family Violence (TCFV) and the Texas Department of Public Safety report that there were 185, 299 family violence incidents reported to law enforcement . . . in 2003 alone. [A 2002 TCFV statewide poll showed that] [f]orty-seven percent of all Texans acknowledged having personally experienced at least one form of domestic violence . . .. Finally, TCFV found that thirty-one percent of all Texans report they have been severely abused at some point in their lifetime.

Donna D. Bloom, Comment, *"Utter Excitement" about Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington*, 36 ST. MARY'S L.J. 717, 726-27.

> Domestic violence impacts this country economically, also.
>
> The sheer volume of domestic violence crime is shocking. Statistics from varied sources reveal the enormity and scope of the domestic violence epidemic. Domestic violence imposes a staggering financial burden on society. The

> economic cost of battering relationships to employers is between five and ten billion dollars per year. Also, substantial health care resources are devoted to domestic violence. The Surgeon General reports that violence against women is the leading cause of injury to American women.

Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUMBIA J. GENDER & L. 1, 33.

**B. Lack of Cooperation of Domestic Violence Victims**

> Compounding the seriousness of the problem, domestic violence is widely regarded as one of the most difficult types of crimes to investigate and prosecute. Because physical abuse typically occurs inside the home, rather than in public, the victim and the victim's children are often the only witnesses to the crime. Consequently, the prosecution's case typically relies heavily on the victim testifying. But getting victims to testify can be a monumental challenge. Most jurisdictions report that in the overwhelming majority of domestic violence cases, victims recant the testimony that was given to law enforcement immediately following the violent event, and many victims refuse to continue cooperating with the prosecution. Some jurisdictions report withdrawal rates as high as ninety-six percent. Unfortunately, the victim's failure to cooperate or testify often leads to dismissal of the case.

Percival, Note, 79 S. CAL. L. REV. at 235-36.

"Non-cooperation by [victim] recantation or failure to appear at trial is an epidemic in domestic violence cases." Beloof & Shapiro, 11 COLUMBIA J. GENDER & L. at 3. Approximately 80% of domestic violence victims either recant or refuse to cooperate at

trial. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1363-64 ; *see also* Bloom, Comment, 36 ST. MARY'S L.J. at 728 n.50 (domestic violence victims refuse to cooperate at trial up to 80% of the time).

Victim non-cooperation leads to case dismissals. During the summer of 2004, one-half of the domestic violence cases set for trial in Dallas County, Texas, which is where the present case is from, were dismissed because of evidentiary problems under *Crawford.* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749-50. Dallas County judges were dismissing up to a dozen domestic violence cases per day. *Id.* at 772-73. Even before this Court's decision in *Crawford*, the most common reason for dismissing domestic violence cases in Brooklyn and Milwaukee was the victims' failure to appear in court or to testify against defendants. *Id.* at 769.

The lack of victim cooperation and the desire to more aggressively pursue domestic violence prosecutions led many prosecutor offices to adopt no-drop policies for domestic violence cases, whereby prosecutor offices deny victims the option of withdrawing complaints. *See generally* Angela Corilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853.

Prosecutors rely heavily on excited utterances to prove a family violence crime when the victim does not appear at trial. Bloom, Comment, 36 ST. MARY'S L.J. at 731. Without such a statement, the prosecutor is unlikely to be able to prosecute such a case when the victim does not cooperate. *Id.*

*Crawford*'s biggest impact will likely be in domestic violence and child abuse cases, in which victims do not always come to the court. Lininger, 91 VA. L. REV. at 750 n.50. A survey of prosecutors in three states showed that prior to *Crawford* they relied

on hearsay in more than one-half of their domestic violence prosecutions. *Id.* at 771. Prosecutors indicate that after *Crawford*, they are more likely to drop domestic violence charges when the victim recants or refuses to cooperate. *Id.* at 750.

> Some critics worry that the challenges *Crawford* created will be the last straw in an area of law that was already so difficult to prosecute, resulting in prosecutors making domestic violence even less of a priority. Compounding the problem, when prosecution success rates decrease, law enforcement officers lose their motivation to target domestic violence ardently, as it becomes more and more evident that their efforts do not translate into more batterers being prosecuted.

Percival, Note, 79 S. CAL. L. REV. at 239.[13]

The issue in this case, like the issue in *Hammon* and *Davis*, provide this Court with the opportunity to clarify a difficult area of federal constitutional law that has powerful and far-reaching ramifications across the country. This Court should nurture this aspect of Confrontation Clause jurisprudence through its infancy and supply much needed guidance by granting this petition and addressing the common fact-pattern presented in this case.

## CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari.

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[13] The State is not suggesting that *Crawford* was incorrectly decided. The State is simply pointing out the importance of the issue presented in this case and its impact on a vast number of cases nationwide, in support of the argument that this Court should grant this petition to provide further guidance in this area.

Respectfully submitted,

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# APPENDIX

In The Court of Appeals
Fifth District Court of Texas

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No. 05-04-00451-CR

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JETT. J. MASON, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

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On Appeal from the County Criminal Court No. 10
Dallas County, Texas
Trial Court Cause No. MA02-45615-L
Opinion issued June 30, 2005

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OPINION

Before Justices Moseley, Francis, and Lagarde [Footnote 1]

A jury convicted Jett J. Mason, Jr. of misdemeanor assault and assessed his punishment at confinement in the Dallas County jail for one day. *See* TEX. PEN. CODE ANN. § 22.01(a)(1), (b) (Vernon Supp. 2004-05). Following the jury's recommendation, the trial court suspended imposition of the sentence and placed appellant on community supervision for six months. [Footnote 2] The issue we must decide in this appeal is whether the non-testifying complainant's out-of-court statements to the police officer who responded to her 911 call were testimonial in nature. We hold they

were testimonial. We further hold that the trial court erred in admitting the statements in violation of the Confrontation Clause, as recently interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and that appellant was harmed by their admission. Accordingly, we reverse the trial court's judgment and remand for further proceedings.

*Facts & Procedural Background*

Donald Blasingame, a patrol sergeant with the Seagoville Police Department, and the State's only witness at trial, testified that on July 6, 2002, he responded to a 911 disturbance call at a Seagoville residence. When Blasingame arrived, the complainant, who was upset, crying, and angry, answered the door. In response to Blasingame's question about why she called the police, the complainant said that she and her boyfriend, later identified as appellant, had been sleeping when his cellular telephone rang. When the complainant woke appellant up to answer the telephone, he slapped her on the face, shoved her off the bed, put his hand on her throat, and told her he was going to kill her. Blasingame observed red marks and swelling around the complainant's mouth and nose, which were consistent with her statements.

Blasingame also spoke to appellant. Appellant told Blasingame that he accidentally hit the complainant when he reached over to get the telephone. Disbelieving appellant's version, Blasingame arrested appellant based on the complainant's oral statements and his observations at the scene.

The complainant did not appear at trial. [Footnote 3] The State sought to prove its case through Blasingame's hearsay testimony of the complainant's oral statements made to him at the scene. [Footnote 4] Appellant objected to the out-of-court statements on both hearsay and Confrontation Clause grounds. [Footnote 5] Following a pretrial hearing outside the jury's presence, the trial court ruled the complainant's out-of-court oral

statements to Blasingame were admissible.

*Arguments on Appeal*

On appeal, appellant asserts only that the admission of the complainant's out-of-court statements violated the Confrontation Clause of the Sixth Amendment. Appellant does not challenge the trial court's ruling on hearsay grounds. Relying on *Crawford*, appellant argues that the complainant's statements were testimonial because they were made in response to "interrogation." Appellant further asserts that the statements were inadmissible because the State did not show the complainant was unavailable or that appellant had a prior opportunity to cross- examine her. Appellant contends that by its use in *Crawford* of the term "interrogation" in its colloquial sense, the Supreme Court sought to broaden the term "interrogation" to ensure the protections of the Sixth Amendment were not circumvented or limited unnecessarily. Thus, appellant argues, in determining whether there was "interrogation," the focus should be on why the questions were asked, and whether the answers "bear testimony," not on where or how the questioning occurred. *See Crawford*, 541 U.S. at 51 (Confrontation Clause applies to "witnesses" against the accused, in other words, those who "bear testimony"). Appellant contends that if a question is asked to gain information from a witness pursuant to an investigation of a criminal offense, interrogation has taken place.

Alternatively, appellant contends that even if the complainant's out-of-court statements were not obtained through interrogation, they are still testimonial because she "reasonably had to expect these statements would be used in a subsequent prosecution against [appellant]." *See Crawford*, 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers, et al. as *Amici Curiae* 3, which argued that included within the class of "testimonial" statements are "statements that were made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial").

The State responds that the complainant's out-of-court statements were not testimonial because they were made "in the initial phase of the investigation when the officer was trying to figure out what happened," they were not the product of a police interrogation, and they were not made under "circumstances conducive to contemplation of future legal proceedings" that would render them testimonial. The State first notes appellant does not contest the trial court's determination that the complainant's statements qualified as excited utterances. The State recites the definition of an excited utterance under Texas law, *i.e.*, "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2). The State then calls our attention to language in *Crawford* that statements made out of impulse are not usually accompanied by an awareness on the part of the declarant that she is "bear[ing] testimony" against another. *See Crawford*, 541 U.S. at 51. The State argues that because the complainant in this case was "extremely upset and visibly injured" when she made the statements, it is not reasonable to expect that she contemplated her out-of-court statements would be used at a later trial. Rather, the State asserts, it is more reasonable to presume the complainant was concerned only with her immediate safety. The State concludes the complainant's out-of-court statements describing the assault were not "testimonial" in nature, were admissible under the excited-utterance exception to the hearsay rule, and, thus, their admission did not violate the Confrontation Clause.

To the extent the State argues that the test for determining whether the witness is "bearing testimony" is a subjective, not an objective, one, and that, by definition, an "excited utterance" is not testimonial, we disagree.

*Pre- and Post-Crawford Law*

Before *Crawford*, hearsay statements were admissible for purposes of the Confrontation Clause if they possessed adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, however, the Supreme Court abrogated the *Roberts* "indicia of reliability" test, holding that without regard to their reliability, testimonial out-of-court statements by a witness are barred by the Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *See Crawford*, 541 U.S. at 68. The Supreme Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

*Testimonial or Non-testimonial*

Leaving for another day any effort to spell out a comprehensive definition of "testimonial," the Supreme Court acknowledged that its refusal to articulate a comprehensive definition would cause interim uncertainty. *Id.* at 68 & n.10. Indeed, the Court was correct. Some guidance, however, can be found within the *Crawford* opinion. The term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. The Court used the term "interrogation" in its colloquial, rather than any technical, legal sense. *See id.* at 53 n.4 (comparing *Crawford* facts to *Rhode Island v. Innis*, 446 U.S. 291 (1980)). "Testimony" is typically "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51 (citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Included within the class of "testimonial" statements are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would

be available for use at a later trial." *Id.* (emphasis added).

In *Crawford's* wake, various courts, both in and out of Texas, have expressed opinions about what constitutes a "testimonial" statement. In *Lee v. State*, 143 S.W.3d 565, 570-71 (Tex. App.-Dallas 2004, pet. ref'd), this Court held that a non-testifying codefendant's out-of-court statement to a police officer was testimonial. The statements in *Lee* were made during a traffic stop, in response to police questioning, regarding the offense for which the defendant had already been arrested, and were recorded on the patrol car's audio-video equipment. *Id.* at 570. This Court concluded that "the formality of the setting . . . was intended to record testimony for the prosecution of the case being investigated." *Id.*

The State cites several Texas cases that have emphasized the formality of the circumstances surrounding the police questioning as indicating the declarant's expectation that the statements would be used in a criminal prosecution. *See, e.g., Brooks v. State*, 132 S.W.3d 702, 707 (Tex. App.-Dallas 2004, pet. ref'd) (holding non-testifying codefendant's written custodial statement made during investigation of charged crime was testimonial); *Gutierrez v. State*, 150 S.W.3d 827, 830 (Tex. App.-Houston [14th Dist.] 2004, no pet.) (op. on remand) (holding accomplice's videotaped statement to police after defendant's arrest was testimonial); *Samarron v. State*, 150 S.W.3d 701, 707 (Tex. App.-San Antonio 2004, pet. ref'd) (holding witness's formal, signed, written statement to police was testimonial). In contrast, the State asserts that the record in this case does not support appellant's contention that Blasingame's inquiry into the reason he had been summoned amounted to an "interrogation" in contemplation of a potential criminal prosecution. The State argues that Blasingame's question was simply intended to assess the situation. In support of its position, the State cites *Wilson v. State*, 151 S.W.3d 694, 698 (Tex. App.-Fort Worth 2004, no pet.) (holding there was no interrogation when witness initiated contact with police and police were

questioning witness to determine why she was upset and not to elicit information about known criminal activity); and *Gonzalez v. State*, 155 S.W.3d 603, 609 n.4 (Tex. App.-San Antonio 2004, pet. stricken) (expressing doubt that investigatory questioning immediately after crime has been committed rises to the level of "interrogation"); *see also Key v. State*, No. 12-04-00030-CR, 2005 WL 467167 (Tex. App.-Tyler Feb. 28, 2005, pet. filed) (holding statements made by complainant to police officer responding to disturbance call not testimonial). [Footnote 6] *Key* is distinguishable. In *Key*, the complainant neither called the police nor initiated contact with the police. *Key*, No. 12-04-00030-CR at *5. [Footnote 7] At trial, the testifying officer did not explain whether the complainant's statements were spontaneous or in response to questions.

The State also cites cases from several other states and two federal circuit courts that have held, under *Crawford*, inquiries by police officers responding to a 911 or other call about the purpose of the call are not testimonial. *See, e.g., Mungo v. Duncan*, 393 F.3d 327, 336 n.9 (2d Cir. 2004), *cert. denied sub nom. Mungo v. Greene*, 2005 WL 429805 (Apr. 25, 2005); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2540 (2005); *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Ct. App. 2004), *review granted*, 105 P.2d 114 (Cal. 2005); *People v. Corella*, 18 Cal. Rptr. 3d 770 (Ct. App. 2004); *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005, appeal pending); *Rogers v. State*, 814 N.E.2d 695 (Ind. Ct. App. 2004); *Fowler v. State*, 809 N.E.2d 960, 964-65 (Ind. Ct. App. 2004), *vacated*, 2005 WL 1405937 (Ind. June 16, 2005); *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *vacated*, 2005 WL 1406007 (Ind. June 16, 2005); *State v. Barnes*, 854 A.2d 208 (Me. 2004); *People v. Bryant*, No. 247039, 2004 WL 2881115 (Mich. Ct. App. Aug. 24, 2004) (not designated for publication); *State v. Wright*, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004, review granted); *People v. Mackey*, 785 N.Y.S.2d 870 (N.Y.

Crim. Ct. 2004).

The State also acknowledges that courts in other jurisdictions have held to the contrary. *See Lopez v. State*, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004); *Pitts v. State*, No. A04A1621, 2005 WL 127049 (Ga. Ct. App. Jan. 24, 2005); *People v. Victors*, 819 N.E.2d 311 (Ill. App. Ct. 2004, appeal denied). These courts seem to focus on whether the statements in question were made under circumstances indicating the complainant knew he or she was making a police complaint and that what was said could be used against the defendant.

We understand the State's position to be that, by definition, an excited utterance is not made under circumstances conducive to subjective contemplation of future legal proceedings. We cannot agree. Moreover, even if we were to assume the State is correct in such premise, we nevertheless conclude, based on *Crawford* itself, that subjective contemplation is irrelevant to an analysis of whether such out-of-court statements would be testimonial or non-testimonial. First, the test set out in *Crawford* is objective, not subjective. Second, even if the test were subjective, the declarant's perception could be determined only through cross-examination. *Crawford* identifies as testimonial "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52 (emphasis added). And, in criticizing the application of the Roberts reliability test, the Court stated,

> [t]he Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her

situation. Only cross-examination could reveal that.

*Id.* at 66. Thus, even if the test were subjective, under *Crawford*, only cross-examination could reveal the complainant's subjective perception of her situation. *See id.*

*Definitions of "Interrogation"*

*Not Interchangeable under Fifth and Sixth Amendments*

In *Rhode Island v. Innis*, the Supreme Court addressed for the first time the meaning of "interrogation" under *Miranda v. Arizona*. [Footnote 8] *See Innis*, 446 U.S. at 291. The *Innis* Court was concerned with the Fifth Amendment privilege against compulsory self-incrimination when it held that other techniques of persuasion beyond express questioning could constitute "interrogation." *See id.* at 300-01. However, the Supreme Court excluded from the definition of "interrogation" any words or actions on the part of the police that were normally attendant to arrest and custody. *See id.* at 300. In *Innis*, however, it is clear the Supreme Court was not considering "interrogation" within the meaning of the Sixth Amendment as reflected by the following language: "The definitions of 'interrogation' under the Fifth and Sixth Amendments, *if indeed the term 'interrogation' is even apt in the Sixth Amendment context*, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." *Id.* n.4 (emphasis added). Therefore, to the extent courts have seemingly used the Innis exclusion from "interrogation" under the Fifth Amendment, *i.e.*, "police words or actions normally attendant to arrest and custody," in determining what is "interrogation," and thus testimonial, we decline to follow their rationale. Such an application would not serve the policies underlying the Sixth Amendment as expressed in *Crawford*. *See Crawford*, 541 U.S. at 61 (goal of Sixth Amendment to ensure reliability of evidence and that reliability be assessed by crucible of cross-examination).

*Application*

It is undisputed that the complainant's out-of-court statements were admitted as substantive evidence for the truth of the matter asserted. The Confrontation Clause does not bar the use of *testimonial statements for purposes other than establishing the truth of the matter asserted. See* Crawford, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). As proponent of the out-of-court statements, the State had the burden to show their admissibility-that is, to show either that the statements were non-testimonial or, if testimonial, that the complainant was unavailable and appellant had been afforded a prior opportunity to cross-examine her. *See id.* at 68. Except for the prosecutor's statement that she did not believe the complainant had been served with a subpoena, the record is silent as to the unavailability of the complainant, and the State presented no evidence that appellant had been afforded a prior opportunity to cross-examine her. Therefore, admission of the statements would not violate the Confrontation Clause only if they were not testimonial.

For the reasons set out above, we conclude the complainant's out-of-court oral statements resulted from an "interrogation" within the meaning of the Sixth Amendment. Thus, the statements were testimonial. Moreover, even if the complainant's out-of-court oral statements were not in response to "interrogation," we nevertheless conclude they were testimonial because they were "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *See id.* at 52.

Because the complainant's out-of-court statements were testimonial and the State did not carry its burden of showing she was unavailable and that appellant had a prior opportunity to cross-examine her, the trial court erred in admitting the out-of-court statements. See id. at 68.

Moreover, because the error was constitutional, we must reverse unless we can conclude beyond a reasonable doubt the error did not contribute to the conviction or punishment. *See* TEX. R. APP. P. 44.2(a). The complainant's out-of-court statements were the only substantive evidence that appellant intentionally hit her. Without them, the State would have had no case. Thus, it is obvious the trial court's error contributed to the conviction. *See Lee*, 143 S.W.3d at 571. We resolve appellant's issue in his favor.

We reverse the trial court's judgment and remand the case for further proceedings.

SUE LAGARDE

JUSTICE, ASSIGNED

Publish

Tex. R. App. P. 47

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Footnote 1 The Honorable Sue Lagarde, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

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Footnote 2 Appellant's community supervision expired on September 11, 2004, absent the filing of a motion to revoke.

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Footnote 3 The record reflects appellant and the complainant were still together at the time of trial.

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Footnote 4 The complainant also gave a written statement. The written statement, however, was neither offered nor admitted into evidence for any purpose, nor does it otherwise appear in the record before us.

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Footnote 5 The State argued in the trial court that the complainant's statements were admissible under the excited-utterance exception to the hearsay rule, *see* TEX. R. EVID. 802, 803(2), and as either a statement by a party-opponent or under the hearsay exception for statements against interest. *See* TEX. R. EVID. 801(e)(2), 803(24); *see also* TEX. R. EVID. 805. The State also contended at trial, and on appeal, that the statements were non-testimonial.

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Footnote 6 The briefs in this case were filed before the *Key* opinion issued, so neither party cited the *Key* case.

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Footnote 7 The opinion states only that when the testifying officer answered a disturbance call one night, he walked in the area to determine where the noise came from, heard screaming that he described as an "unusual" "large emotional" disturbance, and found appellant and the complainant sitting outside on the ground, arguing.

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Footnote 8 384 U.S. 436 (1966).

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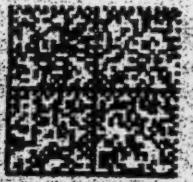

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STYLE: MASON, JETT J., JR.

On this day, the State's petition for discretionary review has been refused.

JUDGE MEYERS WOULD GRANT.

Louise Pearson, Clerk

AK

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